Illegal Migration Bill
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Briefing
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Introduction

1. JUSTICE is a cross-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

Lack of scrutiny

2. JUSTICE remains concerned about the lack of scrutiny of the Illegal Migration Bill ('**the Bill'**), which has such significant implications for the UK's asylum system, the UK's commitment to its obligations under the European Convention on Human Rights ('**ECHR**') and other international legal obligations (such as the Refugee Convention).

3. As the Institute for Government have highlighted, equivalent pieces of legislation in the recent past have received a considerable amount of further scrutiny. For example, the Immigration Act 2016 had 15 committee sessions and received 55 written pieces of evidence. Since this is to be a Committee of the Whole House starting less than three weeks after the publication of the Bill, there will be a lack of detailed, line-by-line scrutiny of its provisions. There will be no evidence taking and, according to the Institute for Government, *'opportunities for detailed discussion and decision on specific proposals are limited and ministers do not need to respond in detail to all the points made in debate'.*[1] This is especially concerning since the Bill had no public consultation or pre-legislative scrutiny.

4. Around twelve hours of Parliamentary scrutiny of such a complex and wide-ranging piece of legislation is plainly unacceptable. The Illegal Migration Bill ('**the Bill')** proposes a significant overhaul of the UK's asylum and immigration system, less than a year after the last significant changes under the Nationality and Borders Act 2022. Rushing through a piece of legislation so quickly, especially in areas as important as the rights of asylum-seekers, the state's power of administrative detention and how we protect victims of human trafficking, will no doubt lead to unintended consequences and legal confusion.

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[1] Hannah White, 'Illegal Migration Bill highlights how expectations of legislative scrutiny have plummeted.' (*Institute for Government*, 2023).

Breaches of the UK's international legal obligations

5. This is a perilous moment for human rights protections in continental Europe, as the war in Ukraine continues and Russia is expelled from the Council of Europe (the leading human rights organisation on the continent). The UK's reputation is strengthened not only by being a party to the ECHR but an active, leading member of the Council of Europe. Now is the moment for the UK to lead on the world stage, reinforcing basic human rights norms and international law, including the European Convention on Human Rights ('**ECHR')** and the Council of Europe Convention on Action against Trafficking in Human Beings ('**ECAT**').

6. We would also note with very serious concern **Amendment 131** that sets out that this Bill should *'be read and given effect to notwithstanding any judgement, interim measure or other decision, of the European Court of Human Rights, or other international court or tribunal; and notwithstanding any international law obligation'.* This gives the Government the extraordinary power to repeatedly breach international law and would place in doubt not only our leadership role in the Council of Europe but our membership altogether. We would urge MPs to vote against this amendment but also not ignore the existing serious concerns about the Bill's compatibility with our international legal obligations.

Compatibility with ECHR

7. The Government have issued a Section 19(1)(b) statement under the Human Rights Act that they are unable to confirm that the provisions of this legislation are compatible with our international legal obligations under the ECHR. In practice, this will have involved the Home Office seeking written advice from its departmental legal advisers on the legislation's compatibility with the ECHR.[2] However, the ECHR memorandum published by the Home Office states throughout that the Government is satisfied that the legislation's provisions are compatible with our ECHR obligations.[3] The only explanation for the Section 19(1)(b) statement is that the legislation is 'new and ambitious' and involves 'radical solutions'.[4]

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[2] Cabinet Office, *Guide to Making Legislation* (2022), para. 3.9
[3] Home Office, *Illegal Migration Bill* (7 March 2023).
[4] *Ibid,* para 47.

8. The Joint Committee on Human Rights ('JCHR') have said that a section 19(1)(b) statement requires *'strong justification as a matter of principle'* – we agree.[5] However, the Government have been sending considerable mixed messages on this point. The Home Secretary stated in the Parliamentary debate at First Reading that she was *'confident',* and indeed *'certain',* that the Bill's measures are compatible with our international obligations.[6] At Second Reading, it was again stated that the Home Secretary is 'confident' that it is within the parameters of our international law obligations.[7] If this is so, based on the legal advice she has received from 'some of the nation's finest legal minds',[8] then it is unclear why the Section 19(1)(b) statement has been made. Pushing the Bill to a vote where the Department in question cannot confirm that, in their view, multiple provisions are compatible with the ECHR threatens our reputation as a country that upholds international law.

9. We note that the comparisons made with the Communications Act 2003 and House of Lords Reform Bill 2012 are misplaced. Whilst a Section 19(1)(b) was made during the passage of the Communications Bill 2002, this was in relation to one specific aspect of the Bill namely the proposed ban on political advertising across all broadcast media. The Communications Bill was subject to *'intensive pre-legislative and legislative scrutiny'*, unlike this Bill.[9] The House of Lords Reform Bill 2012 was withdrawn before Third Reading.[10]

10. Section 1(5) of the Bill sets out that Section 3 of the Human Rights Act ('HRA') does not apply to this Bill. First, JUSTICE is opposed to dis-applying key aspects of domestic human rights law to individual legislation. Section 3 HRA requires the courts to *'read and give effect'* to legislation *'in a way which is compatible'* with ECHR rights '*so far as it is possible to do so'*.[11] The courts cannot *'alter substantially the meaning of primary legislation'* or undermine a *'fundamental feature of the legislation'*.[12] However, if a possible ECHR-complaint interpretation is available, the courts should use that interpretation. Removing the scope of Section 3 HRA suggests that the Government is in

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[5] The Joint Committee on Human Rights, *Scrutiny of Bills: Progress Report, First report of Session 2002 – 2003*, para 15.
[6] Hansard, 'Illegal Migration Bill' (debated 7th March 2023)
[7] Hansard, 'Illegal Migration Bill' (debated 13th March 2023).
[8] *Ibid*.
[9] Aileen Kavanagh, '*Is the Illegal Migration Act itself illegal? The meaning and methods of Section 19 HRA'* (UK Constitutional Law Association, 10 March 2023)
[10] House of Lords Reform Bill 2012.
[11] Human Rights Act 1998, Section 3.
[12] *Ghaidan v Godin-Mendoza* [2004] UKHL 30 (21 June 2004).

fact worried about the provisions of this Bill being incompatible with our international law obligations under the ECHR.

11. It is also worth emphasising this does not prevent the courts from being able to issue a Section 4 HRA declaration of incompatibility with the ECHR. However, given the Section 19(1)(b) statement issued, we have legitimate concerns as to how the Government would respond to such a declaration and, in any event, remedying legislation is often significantly delayed by the limited Parliamentary time.

12. We urge MPs to support **Amendment 1** tabled by Stephen Kinnock MP proposes to remove the disapplication of section 3 Human Rights Act 1998. We would stress the importance of ensuring that section 3 of the Human Rights Act continues to apply to this legislation, as it does to *all other* pieces of legislation passed by Parliament. There is no case for an exception in the case of this Bill and this will likely set a precedent to remove section 3 HRA in future legislation, therefore undermining our domestic human rights legal framework.

13. We also note with alarm **Amendment 132** of Mr Simon Clarke MP that would disapply Section 4, Section 6 and Section 10 of the HRA in relation to this Bill. This would in effect prevent any domestic court from ruling on the Bill's compatibility with our obligations under the ECHR. Courts do not have the power to strike down legislation under section 4 HRA but can make a declaration that the Bill is incompatible, leaving it up to Parliament to respond. Parliamentary sovereignty is already adequately protected. If those who support this Bill are confident that it is compatible with the ECHR, as the Home Secretary has said (see above), then they should welcome the scrutiny of the courts. This is a fundamental aspect of the rule of law. The complete exclusion of section 6 HRA will also prevent individuals from being able to challenge individual decisions that would breach their rights, already significantly reduced in scope by Clause 4 of the Bill. We urge all MPs to vote against Amendment 132 if it is called to a vote.

Concerns the legislation is in breach of the Refugee Convention

14. The United Nations High Commissioner for Refugees ('UNHCR') has said the legislation would *'amount to an asylum ban – extinguishing the right to seek refugee protection in the United Kingdom for those who arrive irregularly, no matter how genuine and compelling their claim may be, and with no consideration of their individual*

circumstances'.[13] They go on to say this would be a *'clear breach of the Refugee Convention and would undermine a longstanding, humanitarian tradition of which the British people are rightly proud'.*[14] We share these concerns.

15. As the former Home Secretary Theresa May MP set out in the Second Reading debate, *'the UK has always welcomed those who are fleeing persecution, regardless of whether they came through a safe and legal route. By definition, someone fleeing for their life will, more often than not, be unable to access a legal route. I do not think it is enough to say that we will meet our requirements by sending people to claim asylum in Rwanda. That matters because of our reputation of the UK on the world stage, and because the UK's ability to play a role internationally is based on our reputation – not because we are British, but because of what we stand for and what we do'*.[15]

16. Whilst we support **Amendment 41** in the name of Stephen Kinnock MP which would ensure that, when a person successfully makes a suspensive claim against their removal, they would be able to pursue an asylum or human rights claim in the UK, we have serious concerns (as set out below) over the legal threshold for suspensive claims and the practical difficulties individuals will have preparing and evidencing their claim, as set out below.

Concerns the legislation is in breach of international obligations regarding modern slavery and human trafficking

17. We also have significant concerns that proposals to deport potential victims of modern slavery/ human trafficking, without properly considering their claim, are incompatible with Article 4 ECHR and ECAT.[16] The SSHD would have a legal duty to deport a potential victim of trafficking, who has not been convicted of a serious criminal offence, in situations where they have a positive reasonable grounds decision from the National Referral Mechanism.

18. We note that the Government believes it can rely on the 'public order' exemption to its obligations under ECAT. However, we note the significant legal concerns raised during the passage of the Nationality and Borders Act 2022 by the Joint Committee on Human Rights and the Independent Anti-Slavery Commissioner around a significant lowering of

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[13] *UNHCR*, 'Statement on UK Asylum Bill' (7th March 2023)
[14] *Ibid*.
[15] Hansard, 'Illegal Migration Bill' (debated 13th March 2023).
[16] See, for example, Articles 13 and 14 ECAT.

the threshold for what constitutes 'public order grounds.[17] These concerns would also apply to this legislation, especially when many will not have been convicted of a criminal offence and may in any event have a defence under Section 45 Modern Slavery Act 2015.[18]

19. The Government's legal justification appears to be that the situation in the Channel necessitates it and there will be protections for those supporting criminal investigations and proceedings. However, first, as the previous Independent Anti-Slavery Commissioner said during the Nationality and Borders Act 2022 debate, providing a sufficient recovery and reflection period is often essential to enable potential witnesses to co-operate with criminal proceedings and therefore limiting such support *'will severely limit our ability to convict perpetrators and dismantle organised groups'.*[19] This will especially be the case when the allegation has only recently been disclosed and the individual in question is in detention. Second, the situation in the Channel was a large part of the justification for the Nationality and Borders Act 2022, which was only passed last year. However, this Bill is now proposing to disapply or dilute several provisions in the Nationality and Borders Act 2022 which placed ECAT requirements into domestic law.[20]

20. We would also observe how unsatisfactory it is that, at present, there is no Independent Anti-Slavery Commissioner in post (despite it being a legal requirement) which means they cannot comment on the potential impact of this legislation on victims of trafficking and modern slavery.[21] This is an important independent voice which was critical in raising issues during the passage of the Nationality and Borders Act 2022.

21. We note **Amendment 50** of Stephen Kinnock MP that would delay entry into force of the modern slavery protections until a new Independent Anti-Slavery Commissioner was appointed and consulted. However, Dame Sara Thornton, the previous Independent Anti-Slavery Commissioner, has said that the Home Office *'failed to heed'* her warnings on the Nationality and Borders Act 2022.[22] The input of the Commissioner is required now to inform the Parliamentary debate.

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[17] Joint Committee on Human Rights, 'Legislative Scrutiny: Nationality and Borders Bill (Part 5 – Modern Slavery)' (21st December 2021).
[18] Modern Slavery Act 2015, Section 45.
[19] Independent Anti-Slavery Commissioner, 'Letter to Rt Hon Priti Patel MP' (7th September 2021)
[20] Home Office, 'Illegal Migration Bill: Explanatory Notes' (7th March 2023).
[21] Emily Dugan, 'Home Office accused of deliberately leaving anti-slavery post unfilled.' (*The Guardian*, August 2022).
[22] May Bulman, 'Home Office 'failed to heed my warnings on immigration bill' says departing anti-slavery tsar' (*The Independent*, April 2022).

22. The Home Secretary's case to Parliament is that our modern slavery laws are being *'abused'*, due to last-minute claims of those convicted of murder and rape to thwart their deportation and the large proportion of those detained for removal who make a modern slavery claim.[23] However, first, it is for Home Office approved First Responders to refer individuals to the Competent Authority if there are suspicions someone is a victim of trafficking/ modern slavery. Second, Section 63 Nationality and Borders Act 2022 already permits the deportation of modern slavery victims with a reasonable grounds decision if they have been convicted of a sentence of at least 12 months.[24]

23. Finally, 90% of the Competent Authority's decisions last year were positive decisions (that there **were** reasonable grounds someone was a victim of trafficking/ modern slavery) and 91% of conclusive grounds decisions were also positive.[25] We would also highlight a clear majority of referred potential exploitation took place in the United Kingdom.[26] There is no evidence that the system is being abused; the Home Office's data highlights the overwhelming majority are credible victims of trafficking/ modern slavery. As the former Home Secretary Theresa May MP made clear in the Second Reading debate, *'the Home Office knows that the Bill means that genuine victims of modern slavery will be denied support'*.[27]

24. In relation to Article 4 ECHR, the European Court of Human Rights has found that member states have a duty to take operational measures to protect victims (or potential victims) of trafficking and a procedural obligation to investigate situations of potential trafficking.[28] We are not convinced that the minimal safeguards proposed by the SSHD in the Bill's accompanying ECHR memorandum are adequate to meet our obligations under Article 4 ECHR, for similar reasons to those set out above in relation to ECAT.

25. JUSTICE has serious concerns therefore that the Bill is in breach of our international legal obligations under Article 4 ECHR and ECAT.

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[23] Hansard, 'Illegal Migration Bill' (debated 13th March 2023).
[24] Nationality and Borders Act 2022, Section 63(3)(f).
[25] Home Office, *Modern Slavery: National referral mechanism and duty to notify statistics UK, end of year summary 2021* (3rd March 2022).
[26] 58% of potential victims claimed exploitation in the UK only. *Ibid*, para 2.2.
[27] Hansard, 'Illegal Migration Bill' (debated 13th March 2023).
[28] *V.C.L and A.N v The United Kingdom* (Application Nos 77587/12 and 74603/12).

26. We note the proposed **Amendments 51 – 60** of Alistair Carmichael MP would disapply the modern slavery provisions of the Bill. This would be the simplest and effective way of protecting the rights of those who are victims of trafficking/ modern slavery. Alternative amendments include **Amendment 24** of Stephen Kinnock MP seeks to reinstate the present public order exclusion grounds from modern slavery laws under the Nationality and Borders Act 2022 and **Amendments 125 – 127** of Joanna Cherry MP which seek to ensure that the disapplication of modern slavery provisions must be in accordance with ECAT.

The Bill permits the deportation of unaccompanied asylum-seeking children

27. Whilst there is no duty to deport, Clause 3(2) permits the SSHD to deport unaccompanied asylum-seeking children. This is despite Robert Jenrick MP, Minister for Immigration, confirming to the Women and Equalities Committee that it was not the Government's *'intention'* to remove unaccompanied minors to Rwanda.[29]

28. The Home Secretary in the Second Reading debate simply confirmed that the duty to remove would not apply to unaccompanied asylum-seeking children and that 'only in limited circumstances' would the power to remove unaccompanied children be used, such as for family reunion.[30] However, the discretion would remain and, as the Children's Commissioner has highlighted, there is '*no detail'* in the Bill itself of when such a power would be used.[31] We note and support **Amendments 140 and 141** of Tim Loughton MP would prevent unaccompanied children who arrived in the UK when they were under 18 years old being deported under Clause 3.

Lack of accountability and ability of individuals to challenge the unlawful use of state power

29. The Bill contains the following powers which will prevent individuals from holding the Government accountable for decisions it makes and challenging unlawful acts by the state:

[29] Women and Equalities Committee, 'Oral evidence: Equality and the UK asylum process' (25th January 2023), Q263.
[30] Hansard, 'Illegal Migration Bill' (debated 13th March 2023).
[31] Children's Commissioner, *Briefing to MPs on Illegal Migration Bill* (March 2023).

(i) **Restrictions on judicial review in cases of potentially unlawful deportations.**

Clause 4(1)(d) states that the duty to deport in Clause 3 applies regardless of whether *'the person makes an application for judicial review in relation to their removal'*. It is unclear from the wording of Clause 4(1)(d) if obtaining an order or interim order of a court in a judicial review claim would suspend the duty to deport. MPs are asked to seek clarification on this issue from the relevant Ministers at Committee.

If interim orders of the court would not prevent removal, this is an extraordinary attack on the rule of law and the constitutional role of the judiciary to legitimately scrutinise Home Office decision-making and prevent unlawful exercise of state powers. As the Government's own response to the Independent Review of Administrative Law said in March 2021, *'Judicial Review helps to ensure [those holding public office] are held accountable and use the powers according to the boundaries and the manner in which they should be exercised, as set down and intended by Parliament'.*[32] As the Immigration Lawyers Practitioners Association have highlighted, this would lead to a 'constitutional crisis'.[33]

JUSTICE is alarmed by **Amendments 133 and 134** of Sir William Cash MP which states plainly that the only way to prevent deportation would be through a *'successful suspensive claim'.* It prevents judges from having any jurisdiction to prevent an individual's removal in Judicial Review proceedings through an interim relief or other kind of court order. We would urge MPs to ensure this amendment is defeated and to seek urgent clarification from Government Ministers as to whether individuals will still be able to seek interim relief to prevent removal under Clause 4(1)(d). Given the practical difficulties individuals can have bringing claims from overseas, and the potential serious consequences of deportation, JUSTICE is opposed to limiting the scope of judicial review in this area especially given our concerns around the suspensive claim process (see below).

Amendment 134 would go further and require the Home Secretary to declare a Judicial Review application as inadmissible under the Bill. However, it is the courts

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[32] Ministry of Justice, 'Judicial Review Reform: The Government Response to the Independent Review of Administrative Law' (March 2021), para 18
[33] ILPA, *Illegal Migration Bill* (March 2023).

who oversee judicial review and claims cannot be unilaterally dismissed by the Secretary of State. This is constitutionally illiterate and dangerous.

It is also alarming that **Amendment 135** of Jonathan Gullis MP would prevent a court from ever ordering an individual's return to the UK if they were deported under Clause 2. This is even if they establish that their deportation was unlawful in subsequent proceedings. Such an amendment is antithetical to the rule of law and would simply give "carte blanche" to the Home Office to make unlawful deportation decisions, with no consequences for doing so.

(ii) **Individuals will not be allowed to apply for immigration bail until after 28 days of detention**

At present, individuals can make an immigration bail application for release to the First tier Tribunal once 8 days has passed since they *arrived in the UK*.[34] It should be noted that one of the central benefits of immigration bail applications are that they are free, require limited paperwork and lead to a quick oral hearing (and decision) in front of an immigration judge. No justification has been provided for the significant extension of this timeframe. If the Home Office are confident about the lawful basis for detaining individuals, then they should confidently defend immigration bail applications. It should also be noted that, at present, if individuals are refused immigration bail, they cannot apply for another 28 days without a *'material change of circumstances'*.[35] We support **Amendment 124** of Joanna Cherry MP which would remove the prohibition on the grant of immigration bail by the First tier Tribunal for the first 28 days.

(iii) **Individuals will be unable to apply for judicial review of an immigration detention decision**

At present, judicial review claims are a vital safeguard for individuals who are seeking to challenge their ongoing immigration detention and to enforce the *Hardial Singh* principles.[36] However, Section 13(4) prevents any individual from

[34] Home Office, *Immigration Bail* (27th January 2023).
[35] First tier Tribunal (Immigration and Asylum Chamber), 'Application to be released on First tier Tribunal bail: Form B1'
[36] The legality of immigration detention is primarily set out by the common-law case of *R (Hardial Singh) v Governor of Durham Prison [1983] EWHC 1 (QB),* often referred to as the Hardial Singh principles. These are

challenging their immigration detention by judicial review. As noted above, the Government have acknowledged that judicial review is a vital safeguard against unlawful state decision-making, and this is especially important for those deprived of their liberty.

We note that the Government's relies on the fact that individuals will be able to apply for a writ of *habeas corpus* at any time in their detention and rely on grounds under Article 5 ECHR.[37] *Habeas corpus* is a historic and little-used legal route within this area given the more predominant use of judicial review proceedings. It is unclear why the Government is seeking to change this. If, as the Government claim, individuals will still be able challenge their detention using the *Hardial Singh* principles and ECHR grounds, then it is unclear why the procedure for challenging detention needs to be upended. However, there is legal commentary that suggests *habeas corpus* only applies if there is a legal question surrounding the authority of an individual's detention whereas judicial review claims can also consider procedural errors, failure to consider relevant matters and fundamental unreasonableness.[38] Since Article 5 ECHR also has a procedural aspect, JUSTICE is concerned that this will limit grounds in which someone can challenge immigration detention.

(iv) **The Bill prevents challenge of procedural errors in immigration detention decisions unless they are a 'fundamental breach of natural justice'**

Section 13(4) sets out that the powers of the immigration officer should not be held to have been exceeded *'by reason of any error made'* in the decision to detain unless that decision was made in bad faith or *'in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice'*. This appears to significantly alter the position set out by Lord Dyson in the Supreme Court case of *Lumba* which found that it was for the SSHD to prove detention was

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summarised in the Supreme Court case of *R (Lumba) v SSHD [2011] UKSC 12* as: '*(i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose; (ii) the deportee may only be detained for a period that is reasonable in all the circumstances; (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not able to effect deportation within a reasonable period, he should not seek to exercise the power of detention; and (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal'.'*

[37] Home Office, 'Illegal Migration Bill: ECHR memorandum' (7th March 2023), paras 33 and 34.

[38] Finnian Clarke, 'Habeas Corpus and the Nature of "Nullity" in UK Public Law' (*UK Constitutional Law Association*, 8th October 2019)

lawful and that *'she cannot do this by showing that, although the decision to detain was tainted by public law error in the sense that I have described, a decision to detain free from error could and would have been made'.*[39] This clause gives the SSHD carte blanche to make error-strewn detention decisions, safe in the knowledge that they cannot be adequately challenged and the individual will struggle to seek their release. This is compounded by the lack of judicial review protections for detention decisions set out above.

(v) **Serious concerns around the proposed suspensive claim procedure**

The main way in which an individual can challenge their proposed deportation to a third country listed in the Schedule (as far as we are aware, for non-nationals, the only agreement presently in place is with Rwanda) is a 'serious harm suspensive claim' under Clause 40 or a 'factual suspensive claim' under Clause 41. We are particularly concerned about the requirement under Clause 40(5) and 41(5) for an individual to have to provide *'compelling evidence'.* This burden is likely to significantly impact victims of torture and those with mental health problems, who may struggle to comment on highly traumatic personal events, especially as these claims are likely to be made when they are adults at risk in an immigration detention centre. We note **Amendment 83** of Alison Thewliss MP which would replace the 'compelling evidence' burden of proof in Clause 40 with a more straightforward 'evidence that there is a real risk'. We also note **Amendment 93** which would remove the unnecessary requirement for 'compelling evidence' to be submitted with a suspensive claim.

However, even if the burden of proof was lowered, we have very serious practical concerns about the proposed suspensive claim procedure including the availability of legal advice within detention, the quality of decisions that will be made within a short time period and the limited timeframes for appeal to the Upper Tribunal. We would also highlight that medical evidence is likely to be required for a 'serious harm suspensive claim' which will be practically very difficult (if not impossible) in such a tight timeframe. This is particularly concerning when, under Clause 46, there are severe restrictions on raising "new matters" (which could potentially include a medical diagnosis revealed by a medical report) and making claims out of time under Clause 44.

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[39] *R (on the application of Lumba) v SSHD* [2011] UKSC 12, para 88.

We also have concerns about **Government Amendment NC11** which proposes that First tier Tribunal judges can act as judges of the Upper Tribunal in such claims, including, according to the Home Secretary's explanatory note, employment judges. This is a complex area of immigration law, involving vulnerable individuals, and since individuals are potentially restricted to one, fast-tracked hearing, it is even more important that there is proper oversight from experienced judges with expert knowledge in this legal area.

We would highlight Stephen Kinnock MP's **Amendment 17**, which would at the very least provide for a removal notice to be *'provided in a language understood by that person'* and '*provide information about how that person may access legal advice'*. This would be a small step in the right direction. We would further urge MPs to press Government Ministers whether legal aid will be available in detention, how Home Office officials will approach extension of time requests and whether all detention facilities will be accessible to lawyers. As the Law Society have said, *'it is a fundamental principle of British justice that cases are given a fair hearing; central to this is allowing enough time for individuals to access the advice they need and to prepare their case properly'.*[40]

Finally, given these claims will affect an individual's risk of 'serious and irreversible harm', we are very concerned about the limited appeal rights in Clause 43 if permission to appeal is refused in claims the Home Office certify as clearly unfounded. Unlike so-called Cart Judicial Reviews, which were abolished by Section 2 of the Judicial Review and Courts Act 2022, only one judge will have made a decision on whether the claim was clearly unfounded under Clause 43 and, in light of the Government's Amendment NC11, this may have just been a First-tier Tribunal judge (including someone who is not a specialist immigration/ asylum judge). This is an insufficient safeguard, when there is a high risk of potential harm and when individuals may struggle to meet the requirement for 'compelling evidence' in the limited timeframe.

[40] The Law Society, *Parliamentary briefing: Illegal Migration Bill, Second reading House of Commons* (10th March 2023).

The Bill hands extensive powers to the executive

30. The way in which the Bill limits accountability is also particularly concerning in light of the powers and discretion the Bill provides to the SSHD, without proper oversight from Parliament:

    (i) **The SSHD is given power to make regulations which could breach our international law obligations**

    Clause 49 gives the SSHD the power to pass *'regulations'* requiring the Government and the courts to ignore interim measures of the European Court of Human Rights in relation to immigration removal cases . First, it is noticeable that such a power is given to the SSHD without the oversight of Parliament. Whilst interim measures are already not binding on domestic courts in domestic law, though they are required to take them into account under s2 HRA, they are binding on the UK Government as a signatory to the ECHR in international law. The explanatory notes describe this as a '*placeholder'* but no amendments have been provided to this section.[41] As drafted, the Bill would give the SSHD wide power to pass regulations to breach international law. This is plainly unacceptable.

    Interim measures are used rarely and only in circumstances where there is an *'imminent risk of irreparable damage'*.[42] In the immigration deportation context, this is most likely to occur when Articles 2 (right to life) and Article 3 (prohibition on torture and ill-treatment) of the ECHR are engaged. If the Government has legitimate concerns with the interim measures procedure in relation to the recent Rwanda decision, the correct way to seek reform would be through our influence in the Counci l of Europe. This influence would be fatally undermined by unilaterally reneging on our international legal obligations. **Amendment 122** of Joanna Cherry MP would ensure that any regulations do not *'deny or undermine'* that interim measures are binding on the UK under international law.

    (ii) **That the SSHD is given a wide discretion to detain individuals and define what a reasonable period of detention would be**

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[41] Home Office, 'Illegal Migration Bill: Explanatory Notes' (7th March 2023), para 216.

[42] See European Court of Human Rights, *Practice direction: Requests of interim measures (Rule 39 of the Rules of Court)*; and *Mamatkulov and Askarov v. Turkey*, Application Nos. 46827/99 and 46951/99, 4 February 2005.

Under Section 11(2) of the Bill, the SSHD is permitted to detain individuals if an immigration officer *'suspects'* that they have met the four conditions that they are liable for removal. Their family members are also permitted to be detained, including children (even if they themselves don't meet the conditions in section 2 of the Bill), pending a decision as to whether their relative meets the criteria for removal and whether they are liable for removal. The Children's Commissioner has said the Bill is likely to 'significantly increase the detention of children'.[43]

Section 12 of the Bill also repeatedly emphasises the importance of the opinion of the SSHD in what a reasonable period of detention or time to make a removal decision is. At present, in a judicial review claim, it is for the courts to assess what is a reasonable period of detention applying the *Hardial Singh* principles. This raises serious questions about the Bill's compatibility with Article 5 ECHR. As Lord Thomas said in *Fardous v SSHD,* '*in determining the lawfulness of the decision made by the Secretary of State, the court examines the decision on the basis of the evidence known to the Secretary of State when she made the decision…**it is this objective approach of the courts which reviews the evidence available at the time that removes any question that the period of detention can be viewed as arbitrary in terms of Article 5 of the European Convention on Human Rights'*** (emphasis added).[44]

(iii) **The SSHD has the power to define "serious and irreversible harm" by regulations**

The SSHD, under Clause 38 of the Bill, would be given the power to make regulations which define *'any aspect of serious and irreversible harm'* and *'give examples of what is and is not to be treated as serious and irreversible harm'*. This is particularly concerning given the reduced ability of individuals to challenge decisions, and the limits placed on judicial oversight. A suspensive claim to the Upper Tribunal that an individual will face 'a real risk of serious and irreversible harm', under Clause 37, is the only route for an individual to make arguments that their deportation would breach Article 3 ECHR (prevention of torture and ill-treatment). This protection is seriously undermined if the SSHD can simply define what is, and is not, serious and irreversible harm. We note that this the Government also says this is a 'placeholder' clause, but that no amendments have been

[43] Children's Commissioner, *Briefing to MPs on Illegal Migration Bill* (March 2023).

[44] *Fardous v. Secretary of State for the Home Department* [2015] EWCA Civ 931.

provided as of yet on this issue by the Government. Parliament should not vote to give the SSHD such broad discretion to determine whether the UK would breach its absolute legal obligations under Article 3 ECHR.

Amendment 152 of Bell Ribeiro-Addy MP would remove the power of the Home Office to set regulations on 'serious and irreversible harm' and leave it up to the courts to define. Whilst we have serious concerns about the suspensive claim procedure as set out in the briefing, this would be a small step in the right direction.

The Bill has retrospective application

31. Legal certainty requires that individuals know what their rights how and how they can be enforced. This is especially important when the UK's international legal obligations are at stake and when extremely vulnerable individuals will be affected. We would highlight the following provisions which will apply retrospectively (i.e. to people who arrived in the UK before this law is passed):

(i) **The Bill gives the SSHD retrospective power to deport those that arrive in the UK on/ after 7 March 2023.**
The legislation will cause huge amounts of legal uncertainty as any individual who arrives in the UK on or after 7 March 2023 is potentially subject to the powers in this legislation (even though it has not been passed into law). Section 5(12) states that the legislation applies to any asylum/ human rights claim made on/ after 7 March 2023 that has not been decided by the SSHD. Given the considerable asylum caseload backlog, it is likely that this will apply to a significant number of people. It is a recipe for legal chaos, uncertainty, distress and will further compound the unacceptable delays in the asylum system.

(ii) **The Bill permits the forced deportation of family members, including children, who came to the UK before this Bill was introduced.**
Section 8 of the Bill permits the removal of family members in the United Kingdom whose asylum/ human rights claims have not been determined but who arrived before this Bill was introduced. This applies if they meet the following conditions: (i) they are a partner, child, parent or adult dependent relative of an individual subject to removal under this Bill; (ii) they do not have leave to enter or remain in the UK; and (iii) they are not a British/ Irish citizen and do not have the right of abode under s2 Immigration Act 1971. They will also face the same restrictions on

legal claims and the disapplication of modern slavery protections.[45] Many of these individuals should have had their protection/ human rights claims determined by now, under previous immigration laws, but will retrospectively face deportation without consideration because of the considerable delays. We note that **Amendments 143 and 145** of Tim Loughton MP would reapply the present restrictions on the detention of unaccompanied children. **Amendment 21** of Stephen Kinnock MP would reapply the restrictions on the detention of pregnant women. We support both these amendments.

(iii) **Reversing protections for victims of modern slavery/ human trafficking**

Section 21 of the Bill seeks to remove protections for individuals in the Nationality and Borders Act 2022 to not be removed during their recovery period and to grant individuals limited leave to remain in certain circumstances. It gives the SSHD broad powers to retrospectively revoke leave granted legitimately under legislation approved by Parliament last year (see Section 21(8) of the Bill). This is no way to legislate in an area that involves how we as a country protect victims of human trafficking and modern slavery.

Conclusion

32. In conclusion, JUSTICE continues to be opposed to this legislation because: (i) it has not been given proper consultation given its significant consequences on UK immigration policy; (ii) there are strong arguments that it breaches our international law obligations; (iii) it seeks to prevent individuals holding the Government accountable for its decisions; (iv) it hands significant powers to the executive; and (v) it would apply retrospectively, which is both deeply unfair and undermines legal certainty.

33. JUSTICE would urge all Members of Parliament to vote against the Bill at Third Reading and to urge the Government to think again. We are incredibly concerned by the speed in which this Bill is progressing through Parliament, given the potential consequences of the legislation, and would urge MPs to think carefully about the wider message passing this legislation would send.

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[45] The Children's Commissioner has said that child victims of modern slavery *'will be incentivised to avoid seeking support and help, out of fear of deportation'.* Children's Commissioner, *Briefing to MPs on Illegal Migration Bill* (March 2023).